IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 753 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HIRABHAI RUPABHAI PRAJAPATI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 753 of 2003

MR BS SUPEHIA for Petitioner No. 1

MR AJ DESAI APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 23/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused-Hirabhai Rupabhai Prajapati has filed this appeal through jail and prayed for free legal aid, therefore, learned advocate, Mr.B.S.Supehia was appointed to defend his case.

#. The appellant-accused was charged for serious offences like murder u/S.302, robbery u/S.392, rape u/S.376 of the IPC and Section 135 of the Bombay Police Act.

#. As per the prosecution case, on the day of incident i.e. on 15.9.2001 at about 10.00 a.m. deceased-Anadiben, aged 11 years, had gone to field of Bilaliya for grazing buffaloes with her brother-Ramesh, aged 8 years in sim of village Khumbardi. Her brother-Ramesh was grazing buffaloes in the fields, whereas, deceased-Anadiben was plucking groundnuts from the field. At that time, the accused, who had put on black pant and sky blue colour short caught deceased-Anadiben and snatched away silver necklace put on by Anadiben. Thereupon, Anadiben raised shouts. On hearing the shouts of his sister, Ramesh had seen the same from the sheda. The accused was having knife in his hand and giving knife blows to his sister-Anadiben. Ramesh immediately went to the village and met complainant-Nagabhai and informed about the incident. Ramesh narrated that a man wearing sky blue shirt and black pant snatched away necklace from his sister-Anadiben and then gave knife blows to her. On raising shouts by him that person ran away towards field of Mashrubhai Rabari. When he reached near his sister-Anadiben after raising shouts, she died there and then. Thereupon FIR was filed by complainant-Nagabhai and immediately police started investigation. On the same day Kanji PW-7 Ex.37 staying at village Khumbardi was grazing cattle in his field on the day of incident. In the afternoon at about 3.00 p.m. he had gone to fetch water to the field of Rajiben. At that time, accused-Hirabhai Rupabhai came for drinking water and after drinking water he left the place. At that time, he put on black pant and sky blue shirt. On the next day of incident i.e. on 16.9.2001 the accused sold silver necklace to Soni Vijaykumar Babulal PW-8 Ex.38 at Dhanera by saying that his wife was sick and he wanted money. He had also issued bill for purchasing of silver necklace to the accused on 20.9.2001. P.I., Mr.Vaghela received wireless message that accused was arrested in connection with some offence at Sanchod Police Station at Rajasthan.

Thereupon, police went there and arrested the accused. After completing their investigation, the police filed charge sheet against the accused for the aforesaid offences. The case was thereafter tried before the court of learned Additional Sessions Judge, Fast Track Court, Palanpur being Sessions Case No.220 of 2001. The learned Judge, after considering the evidence of eye witness-Ramesh Ex.10, Kanji Ex.37, Valiben Jetha Ex.35, mother of the deceased-Anadiben and evidence of Soni Vijaykumar Babulal Ex.38, came to the conclusion that the prosecution has proved its case against the accused for the offences u/Ss.302 and 392 of the IPC and accordingly, he sentenced him to suffer life imprisonment for the offence u/S.302 of the IPC and 7 years RI for the offence u/S.392 of the IPC. Both the substantive sentences were ordered to run concurrently. However, the learned Judge acquitted the accused for the other offences u/S.376 of the IPC and Section 135 of the Bombay Police Act as there was no evidence to convict the appellant-accused for the said offences. This judgment and order of conviction and sentence dated 31.5.2003 passed by the learned Judge is challenged in this appeal by the appellant-accused through jail.

#. Learned appointed advocate, Mr.Supehia has taken us through the reasons assigned by the learned Judge for convicting the appellant-accused for the offences u/Ss.302 and 392 of the IPC as well as the entire R & P of the case.

#. Mr.Supehia vehemently submitted that in this case except the child witness-Ramesh there is no eye witness and evidence of child witness-Ramesh is wholly unreliable, therefore, learned Judge committed grave error in relying upon his evidence for convicting the accused for the offence u/Ss.302 and 392 of the IPC. It is no doubt true that the learned Judge has relied upon the evidence of eye witness-Ramesh for convicting the appellant-accused u/Ss.302 and 392 of the IPC. He is a child witness, aged hardly 9 or 10 years when he deposed before the court. The incident had happened on 15.9.2001 at that time, he must be 8 years old, therefore, we have carefully scrutinised his evidence. From careful perusal of his evidence one thing is clear that his presence at the time of incident was absolutely natural and he cannot be branded as a chance witness. Deceased-Anadiben was hardly 11 years old and she was real sister of this witness-Ramesh. He was a school going boy studying 4th standard. He has stated in his evidence before the court that on the date of incident, he had gone to the field along with his sister-Anadiben to graze their buffaloes.

He had stick with him, whereas his sister was having sickle. She was plucking ground nut from the field and he was looking after buffaloes. In the afternoon he and his sister had taken food which they brought with them. At that time one person wearing sky blue colour shirt and black pant came there and snatched away the silver necklace from deceased-Anadiben. Therefore, his sister raised shouts, which he had seen from Sheda. He was having knife in his hand and gave knife blows. He raised shouts. thereupon, the accused ran towards the field of Mashrubhai. He had identified the accused while sitting in the court. After the accused had ran away from the place of the incident he has gone towards his sister and saw that his sister had received injuries on her stomach, chest and head and blood was coming out from the injuries. She asked for water. He gave it and, thereafter, she died. He came to his house crying and narrated the incident to his brother-Nagabhai and his mother Valiben. His sister-Anadiben was already engaged. Patel Dalram Magha was would be father-in-law of the deceased and on the said necklace name of Patel Dalram Magha was written. He was effectively cross-examined by the advocate of the appellant-accused. In his cross-examination he has stated that prior to the incident he had never seen the accused and when the accused was brought by the police he was not present. On the evening of the day of the incident, police asked him about the incident. At that time he was not knowing the name of the assailant. He candidly admitted in his cross-examination that no test identification parade of the accused was held in his presence and he had only stated before the police that assailant put on sky blue colour shirt and black pant. Except that he had not given any description of the assailant. His sister was at a distance of hardly 100 to 200 ft. There was one sheda in the field and his sister was plucking ground nuts. He has candidly admitted in his cross-examination that the place from where he was playing he could not see his sister and for seeing his sister he has to climb sheda. On hearing the shouts of his sister he felt that something had happened and, therefore, he climbed on sheda and saw that the accused running away towards the field of Mashrubhai. From his back, he could see that he had put on sky blue colour shirt and black pant. He has clearly denied the suggestion made to him in the cross-examination that the assailant was not accused. He has also clearly denied that muddamal article i.e. necklace was not of his sister. He has also stated that it was not true that his brother-Nagabhai told him to identify the accused in the court and, therefore, he had falsely identified the accused in the court.

#. From the aforesaid cross-examination of this witness-Ramesh, it is clear that the appellant-accused was the assailant, who was rightly identified by him in the court. However, Mr.Supehia vehemently submitted that this witness-Ramesh had not stated in his evidence that he had seen the face of the accused, therefore, it was not possible for him to identify the accused in the court from the cloths put on by him at the time of incident. One should not forget that the incident in question had happened in broad day light and it would not be impossible for the witness to identify the person in the court because Ramesh had clearly stated in his evidence that on hearing his shouts the accused ran away towards the field of Mashrubhai during that process he must have seen the accused because of that only he could identify him in the court.

Mr.Supehia then submitted that it is impossible to believe that this child witness-Ramesh was not knowing the accused because they were from the same village. We are not prepared to accept this submission because there was a wide difference in the age of this witness and the accused. Ramesh was hardly 8 years old, whereas, the accused was 23 years or so. The accused was a young man, therefore, though he must be living in the same village, Ramesh may not have any occasion to see him. In fact, the manner in which this child witness deposed before the court shows that he is the most truthful witness and there cannot be any difficulty in relying upon his evidence and in our considered opinion the learned Judge has rightly relied upon his evidence for convicting and sentencing the accused.

#. Kanji Ex.37 has indirectly corroborated the evidence of this child witness-Ramesh. When he stated in his evidence before the court that in the afternoon this accused had come to the field of Rajiben for drinking water. At that time he had put on black pant and sky blue colour shirt. Similarly, Valiben, mother of deceased-Anadiben and child witness-Ramesh stated in her evidence that in the evening Ramesh came home crying and stated that a person wearing black pant and sky blue colour shirt snatched away necklace from the neck of deceased-Anadiben and gave knife blows to her and then ran towards the field of Mashrubhai. Thus, say of this child witness-Ramesh is also corroborated on this point viz. clothes put on by the accused at the time of incident and running towards field of Mashrubhai.

#. Most important evidence is of Soni Vijaykumar Ex.38,

who has stated before the court in his evidence that on the next day of incident i.e. on 16.9.2001, the accused came to his shop at Dhanera for selling silver necklace by saying that his wife is sick and, therefore, he wanted to sell the necklace. He purchased it and paid Rs.1,000/=. For the same he has issued receipt also. On the said necklace name of Patel Dalram Magha was written. This Patel Dalram Magha is none else but would be father-in-law of deceased-Anadiben, who had given that necklace on her engagement. However, Mr.Supehia vehemently submitted that prosecution has not examined this witness Patel Dalram Magha to prove that he had given this necklace to Anadiben. We are really surprised with this submission. Valiben had also stated and identified this necklace put on by Anadiben at the time of incident. Similarly, Dineshbhai has also said the same thing, therefore, non-crossexamination of Patel Dalram Magha was not fatal to the prosecution.

From the aforesaid evidence of the prosecution witnesses as well as other documentary evidence, in our considered opinion the prosecution has proved its case against the appellant-accused beyond reasonable doubt and the learned Judge has also rightly found the appellant-accused guilty for the offences u/Ss.302 and 392 of the IPC and sentenced him accordingly. In that view of the matter, we do not find any substance or merit in this appeal and accordingly it is dismissed in limine at the admission stage.

(B.J.Shethna, J.)

(J.R.Vora, J.)

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